Supreme Court, U.S.
FILED
AUG 5 - 2003
OFFICE OF THE CLERK

No. 02-1674

In The
# Supreme Court of the United States

MITCH MCCONNELL,
UNITED STATES SENATOR, *et al.*,

*Appellants,*

v.

FEDERAL ELECTION COMMISSION, *et al.*,

*Appellees.*

**On Appeal From**
**The United States District Court,**
**District Of Columbia**

## BRIEF OF *AMICI CURIAE* BIPARTISAN FORMER MEMBERS OF THE UNITED STATES CONGRESS IN SUPPORT OF APPELLEES

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## INTEREST OF *AMICI*

*Amici* are former members of the U.S. Senate and U.S. House of Representatives (the "Former Members").[1] They are deeply interested in the Bipartisan Campaign Reform Act ("BCRA") and in this litigation because its outcome will shape the environment for federal elections for decades to come and have a profound impact on citizens' confidence in the integrity of federal elections and of the officials who are elected. This Court's decision will either bolster a nascent hope for meaningful campaign reform or cause a return to the pre-BCRA days of cynicism and disillusionment. The Former Members have devoted many years, for some most of their lives, to making representative government work in practice, including the real and gritty business of running for office. They hold a unique position among interested parties in that they (a) have studied and crafted federal campaign finance law, (b) have lived with its consequences as federal candidates, fund-raisers and officeholders, and (c) are free to criticize the fund-raising system they no longer rely on to remain in office. In those roles the Former Members have seen, firsthand, the growing influence and appearance of influence of big money and special interests on elections and the legislative process. They are also acutely aware of the resulting sense of disenfranchisement felt by so many citizens. Based on their experience and their exceptional knowledge of the system, the Former Members attest to the need to "clean up" the financing of federal campaigns

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

and by so doing to restore the voters' confidence in the process. They believe the principles enacted by BCRA advance these worthy objectives.

The Former Members who have joined in this brief are an impressive and diverse bipartisan group whose service in Congress and experience in federal elections spans the modern campaign era. The Former Members are identified in the Appendix. Collectively, they represent more than 500 years of elected public service at the federal level. They come from both sides of the political aisle with constituencies from all walks of life: young and old, poor and wealthy, urban and rural, educated and uneducated.

## SUMMARY OF ARGUMENT

*Amici* submit this brief to convince this Court of the profound necessity to sustain the reforms enacted by the Bipartisan Campaign Reform Act ("BCRA"). The Former Members are on intimate terms with the practical realities of campaign finance law. They know the effects of soft money on elections, and they know its effects on the legislative process. While serving in Congress, they witnessed the conflict between the ideal of representative government, where a representative's duty and exercise of judgment is owed to constituents and to the broader public interest, and the reality of raising the enormous sums of money needed for the next election. They hope that their experience will demonstrate to the Court the compelling need for reform. They believe that the benefits of BCRA in serving the values of a democratic republic do not come at the expense of free speech or vigorous electioneering. Indeed, BCRA will expand the number of voices participating in elections. BCRA will move elections closer to the ideal of a contest of ideas among all interests and away



from recent trends of elections as contests only among moneyed interests. BCRA will help check a growing cynicism in the electorate and foster greater participation in campaigns at the grass roots level and in voting itself.

The Former Members wish to underscore that the campaign finance system that existed before BCRA corrupted and undermined the legislative process in that it often altered legislative outcomes by elevating moneyed interests at the expense of the broader public interest. Members of Congress are induced to offer their time and attention to donors, and in particular to large donors. Regrettably, but undeniably, it is a fact of political life that members of Congress are often more attentive to those who donate money to them or to their political party than to those who do not. Large donations are the lifeblood of any campaign. Money leads to preferential access, and access means influence. Through such "access," large donors are able to influence legislation to their advantage, often to the detriment of the overall public interest. Members of Congress quickly learn that if they do not provide time and attention to large donors, and if they do not act to influence or acquiesce in legislative decisions favoring such large donors, then they and their party are likely to be at a serious disadvantage. As former Senator Paul Simon bluntly stated, "When people have donated $50,000 or $100,000, they are going to want their pound of flesh after the election." Declaration of Senator Paul Simon ("Simon Decl.")[2] ¶ 15. The expectation is unwritten, but is often honored nonetheless.

[2] This and the other declarations cited herein from former and current members of Congress are in the record and were cited in the opinions below. *See, e.g.*, Memorandum Opinion of Judge Kollar-Kotelly (D.D.C. May 19, 2003), *reprinted in* Appellants' June 2003 Supplemental

(Continued on following page)

Foes of BCRA claim that all is well so long as there is no *quid pro quo* between the donor and the officeholder. The reality is that serious, if incremental, corruption occurs without any explicit *quid pro quo* agreement. The *quid* is given with the expectation that the *quo* is, or soon will be, on its way. Those expectations are rewarded often and amply enough to keep everyone playing the game. Even where the expectation is not fulfilled, the perception remains among others in Congress and in the public at large that money "opened the door" or "greased the wheels" of government.

The Former Members want to emphasize that most of their colleagues serving then and now are upright and honest men and women who are doing their best to serve the public. Cases of personal venality and individual corruption are quite rare. Nonetheless, the corrosive effect of the money chase on the institution of Congress overall and the public's perception of it are not in dispute.

BCRA does not end all campaign donations, of course, so it does not remove all temptation to favor donors. But BCRA will effectively end the single worst temptation – the unlimited soft money donations that function with essentially the same effect and influence as direct campaign donations.

If unchecked by BCRA, donors will continue to use soft money loopholes to avoid the key provisions of pre-BCRA law, including the requirements to disclose the identity of donors, limit the amount of donations, and prohibit donations from corporations and unions. In reality, BCRA does little more than reimpose the limits on

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Appendix to Jurisdictional Statements, Vol. II. The declarations can also be found at www.campaignlegalcenter.org.



campaign finance practices that this Court has previously found to be constitutional.

These soft money loopholes are primarily exploited by means of the so-called "issue" advertisement. Issue advertisements purport not to advocate the election of a particular candidate; that is a fiction believed nowhere, but relied on everywhere to skirt the prior law. Virtually every member of Congress has either benefited from or been pilloried by an issue advertisement. Because candidates for federal office ultimately learn the source or sources of funding for most of these advertisements, large soft money donations funding them present a serious potential for undue influence.

The Former Members are very familiar with negative attitudes held by the public toward government in general and toward big-money politics in particular. This public cynicism is based on a perception that a citizen without great wealth cannot effectively participate in government. Such cynicism is supported by an observation of pre-BCRA campaign and legislative practices. The belief that "money talks," and that *only* "big money" talks effectively, corrodes the foundation of American democracy by conveying to average non-wealthy citizens a sense that their participation does not matter. The Former Members believe that upholding BCRA will do much to expand the depth, breadth and authenticity of political speech occurring in an election, and rather than curtail speech will encourage every citizen, regardless of wealth, to take part in his or her government.

## ARGUMENT

The growing use of the soft money loophole in the Federal Election Campaign Act (FECA), Pub. L. No. 93-443, 88 Stat. 1263, 2 U.S.C. § 431 *et seq.* (1974), can be chronicled with numbers and statistics. For the 1992 elections, the two major parties raised $86 million in soft money. This amount roughly tripled for the 1996 elections and then nearly doubled again to $495 million in the 2000 election cycle. Memorandum Opinion of Judge Kollar-Kotelly (D.D.C. May 19, 2003), *reprinted in* Appellants' June 2003 Supplemental Appendix to Jurisdictional Statements Vol. II (hereinafter "Kollar-Kotelly Op.") at 489sa. Soft money accounted for 42 percent of the spending by the national political parties in the 2000 presidential election. Kollar-Kotelly Op. at 491sa *citing* Expert Report of Thomas Mann at 24-25. Yet this exponential growth only begins to tell the story. *Amici* here witnessed firsthand the harm caused by exploitation of the loopholes closed by BCRA, including distortions in policy-making favoring large donors and the demoralization of the electorate.

Our republican form of government depends upon the essential trust of the people – trust in their elected representatives to serve the public interest and the common weal. The Former Members believe that BCRA is necessary to combat the dry rot eating at that element of trust and at republican government itself. They believe that BCRA will help restore integrity to the federal electoral process, mend the damaged trust with the electorate, and improve and expand political discourse in this country. The Court should take notice of and credit their firsthand observations concerning the practices BCRA is designed to correct and the overwhelming need for the reforms BCRA makes. Similarly, the Court should give deference to the Congress



that enacted BCRA in that campaign finance reform is squarely within its area of special expertise.[3]

### I. BCRA WILL HELP RESTORE INTEGRITY TO NATIONAL POLITICS BY ENDING LARGE SOFT MONEY DONATIONS.

#### A. The National Parties Expect Members of Congress to Raise Soft Money, and Members are Rewarded or Penalized Accordingly.

BCRA was passed in part to reform the manner in which members of Congress ("Members") raise money for their respective political parties. Under the prevailing pre-BCRA regime, Members were expected to raise significant amounts of soft money for their party committees, were given incentives to do so, and could face sanctions if they did not. The party committees usually asked Members to solicit additional contributions from persons who had already donated the maximum possible amount to the Member's election campaign. The party committees kept track of how much each Member raised, and this governed in large part how much money the party was willing to

[3] *See FEC v. Beaumont*, 123 S. Ct. 2200, 2207 (2003) ("[D]eference to legislative choice is warranted particularly when Congress regulates campaign contributions, carrying as they do a plain threat to political integrity and a plain warrant to counter the appearance and reality of corruption and the misuse of corporate advantages."); *Nixon v. Shrink Mo. Gov't Political Action Comm.*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring) ("Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments. . . . "); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209 (1982) ("[C]areful legislative adjustment of the federal electoral laws . . . to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference. . . . ").

spend on that Member's election campaign. Members were asked to make the calls to raise the money because donors preferred to give with the knowledge of a Member, thus gaining favor in the Member's sight. Donors often gave to a party committee with the understanding that the funds would go on the "tally" or be credited to the "account" of a particular candidate and be used to help with his or her campaign. Party committee officials regularly informed Members of large donations and who made them.

Most donors were well aware that Members could take direct credit for their donations to the parties, and would specifically inform the Member when they made a party donation. An experience typical for the Former Members is that of Senator David Boren: "Like other Senators, I was expected to 'sell a table' and attend these [fund-raising dinners], and, from time to time, I did. Sometimes, lobbyists called me or other Senators, offered to buy a 'table' for the corporation they represent and then offered to 'make sure the donation goes on your tally.'" Declaration of Senator David Boren ("Boren Decl.") ¶ 5. Senator Dale Bumpers recounts: "The last time I ran, I remember that the DSCC [Democratic Senatorial Campaign Committee] promised to give every candidate a minimal amount of money regardless of whether he or she did any fundraising for the DSCC. To get more than the minimum, however, you had to raise money for the DSCC. For example, if I had helped the DSCC raise the maximum amount it could legally expend on my behalf, I certainly would have expected the maximum to come back to me." Declaration of Senator Dale Bumpers ("Bumpers Decl.") ¶ 11. The Former Members have had similar experiences.

Conversely, Members who did not raise soft money often were penalized. The party committees withheld donations to candidates who did not raise money for the party. "I . . . tried to minimize the time I spent raising 'soft



money' for the Democratic Party, and as a result, I received almost no money from the Democratic Party for my campaigns. At the time, the DSCC and other national party organizations kept records or 'tallies' of how much soft money a Senator had raised for the party. The DSCC then gave little money to the campaigns of those Senators who had not raised adequate party funds." Boren Decl. ¶ 4. This experience is similar to that of the Former Members in both parties, who also saw particular soft money expectations levied by leadership on colleagues who held seats on the most powerful committees. There is an inseverable link between the national political parties, their congressional fund-raising committees and federal candidates. Large contributions to national parties and their committees pose the same risk of corruption or appearance of corruption as large contributions by individuals directly to candidates themselves. The latter have been banned by Congress and upheld by this Court for decades.[4] BCRA merely prevents individuals and others from doing indirectly what they cannot do directly.

Soft money is used less and less for traditional, grassroots, party-building activities, and more and more for electioneering. This should be expected because it is axiomatic that the primary function of political parties is to get their candidates elected. Moreover, this Court has recognized that expenditures of candidates and of political committees "are, by definition, campaign related." *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976). As Senator Bumpers stated: "Political parties' primary interest is in supporting and electing their candidates. The parties are

[4] *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *FEC v. Beaumont*, 123 S. Ct. 2200 (2003).

money raisers, and they spend the money they raise to assist their candidates in campaigns." Bumpers Decl. ¶ 4. As set forth below, this campaign spending typically takes the form of so-called "issue" advertising.

### B. Soft Money Donations Unavoidably Corrupt the Legislative Process.

In establishing a democratic republic, the Founders intended elected officeholders to cast their votes and make other decisions based on some combination of their own judgment, the preferences and expectations of their constituents, and a regard for the larger public interest. This ideal is undermined by current practices relating to soft money.

Because soft money donations are so large compared to hard money donations, the soft money donations heavily influence Members in the legislative process. And because legislative leaders are especially interested in and informed about these donations, the effect on key leadership decisions, such as taking party positions and scheduling bills for consideration, are particularly susceptible to undue influence.

Of course, it would be against the law for an explicit *quid pro quo* to exist between Member and donor. But the relationship need not be an explicit one to effectively corrupt the legislative process. As this Court observed in its recent decision in *FEC v. Beaumont*, 123 S. Ct. 2200, 2207 (2003), "corruption" is to be "understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence."



#### 1. Large Donors Enjoy Disproportionate Access to Members of Congress.

In the pre-BCRA system, many Members granted greater "access" to large soft money donors and raised money from donors for whom they made favorable legislative decisions. In turn, donors gave financial support to Members perceived to be sympathetic and willing to further the donors' legislative agenda. Whatever the cause and effect relationship in a given instance, the cumulative effect and appearance are suspect.

It is only natural that a busy member of Congress with ten minutes to spare will spend those minutes returning the call of a large soft money donor before or instead of the call of other constituents. Money equals access which equals influence. Former Senator Paul Simon's testimony filed with the court below is illustrative of the views of the Former Members:

> Because few people can afford to give over $20,000 or $25,000 to a party committee, those people who can will receive substantially better access to elected federal leaders than people who can only afford smaller contributions or can not afford to make any contributions. When you increase the amount that people are allowed to give, or let people give without limit to the parties, you increase the danger of unfair access.

Simon Decl. ¶ 16.

Party committee officials often promised large donors access to Members in return for contributions. Perceiving that their political survival depended on it, Members and their staffs easily recalled who their party's large donors were and usually were eager to grant requests for attention.

> No matter how busy a politician may be during the day, he or she will always make time to see

> donors who gave large amounts of money. Staffers who work for Members know who the big donors are, and those people always get their phone calls returned first and are allowed to see the Member when others are not.

Declaration of Senator Alan K. Simpson ("Simpson Decl.") ¶ 9.

The congressional community is not large. Members know which lobbyists represent large donors. Large donors and Members attend conferences, briefings, retreats, golf outings and dinners together on a frequent basis. Each group needs what the other has. It is natural that Members should feel beholden to the donors. Donors and their representatives communicate openly with Members about financial matters, notifying them when large donations to the party have been made, sometimes even preferring to hand the checks directly to the Members. Members and donors often do not discuss matters pending in Congress at the same time that donations are discussed. This formality helps to insulate the transaction from becoming a *quid pro quo*. But even at fund-raising events it is not uncommon for the donor to mention a desire to see the Member at some subsequent time about a matter of interest. Though most donations are made without specific intention of asking for something in return, donors are aware that their donation will afford them access when they need it.

The Former Members stress that it was exceedingly rare for a Member to make a particular legislative decision because of a particular past or expected donation. The system was much more subtle and incremental than that. Even as the vast majority of individual Members have never "sold" a vote, it is just as true that the influence of campaign donations is so pervasive that it acts as an



invisible hand to guide and nudge outcomes in ways that causation is always "plausibly deniable."

The larger the donation, the greater the access. "Sometimes, the party asked us to solicit soft money for attendance at events that included access to the president; other times major donors were given access to certain lawmakers. The more money one donates, the higher-level players he or she has access to." Simpson Decl. ¶ 4.

The Former Members are convinced that the reason most large donors give to political parties is because the donors believe they will receive special access to and influence over government officials, even as most also feel their cause is legitimate or even altruistic. Donors also believe, with ample justification, that if they do not make large donations when requested by Members, those officials will pay less attention to their views and positions or even favor those with opposing views. Because Members need donations to survive politically, and because donors need the access their donations obtain for them, and because an opposing party or competing donor is usually ready to fill any vacuum in the system, neither the Members nor the donors can afford to "unilaterally disarm" by opting out of the fund-raising "arms race." In order to reform the system, it takes legislation like BCRA to level the playing field for all involved.

### 2. Large Donors Exercise Disproportionate Influence on the Legislative Process.

The Former Members believe that the pre-BCRA system distorted and corrupted the legislative process in ways ranging from the subtle to the blatant. As noted, Members make time to meet with large donors or their representatives. Such meetings "are not idle chit-chats

about the philosophy of democracy," as Senator Warren Rudman describes them.

> In these meetings, these special interests, often accompanied by lobbyists, press elected officials – Senators who either raised money from the special interest in question or who benefit directly or indirectly from their contributions to the Senator's party – to adopt their position on a matter of interest to them. Senators are pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way. No one says: "We gave money so you should do this to help us." No one needs to say it – it is perfectly understood by all participants in every such meeting.

Declaration of Senator Warren Rudman ("Rudman Decl.") ¶ 7. The Former Members can attest to the accuracy of Senator Rudman's description. The access afforded to large donors to, at a minimum, make their case, gives them a substantial advantage. A large donor is much more likely than others to be successful in inducing legislative decisions that benefit the donor.

The Former Members have witnessed specific examples of legislation affected by the influence of large money donors. Senator Simon recounts one such incident:

> It is not unusual for large contributors to seek legislative favors in exchange for their contributions. A good example of that which stands out in my mind because it was so stark and recent occurred on the next-to-last day of the 1995-96 legislative session. Federal Express wanted to amend a bill being considered by a Conference Committee, to shift coverage of their truck drivers from the National Labor Relations Act to the Railway Act, which includes airlines, pilots and railroads. This was clearly of benefit to Federal



> Express, which according to published reports had contributed $1.4 million in the last two-year cycle to incumbent Members of Congress and almost $1 million in soft money to the political parties.
>
> I opposed this in the Democratic Caucus, arguing that even if it was good legislation, it should not be approved without holding a hearing, we should not cave in to special interests. One of my senior colleagues got up and said, "I'm tired of Paul always talking about special interests; we've got to pay attention to who is buttering our bread." I will never forget that. This was a clear example of donors getting their way, not on the merits of the legislation, but just because they had been big contributors. I do not think there is any question that this is the reason it passed.

Simon Decl. ¶¶ 13-14.[5]

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[5] Senator John McCain, one of BCRA's sponsors, describes another:

> In June 1998, it was widely reported that during the Senate's consideration of a bill entitled the National Tobacco Policy and Youth Smoking Reduction Act (S. 1415), U.S. Senator Mitch McConnell, then head of the National Republican Senatorial Committee, talked at a Republican Senators' policy lunch about political advertising by major tobacco manufacturers. In a complaint it filed on June 29, 1998 with the Federal Election Commission, the Campaign for Tobacco-Free Kids characterized Senator McConnell's communications as follows: "Based upon reports that have been widely published in the news media, only hours before Republican Senators were due to vote for or against cloture on S. 1415, Senator Mitch McConnell informed his colleagues in a closed door meeting that if they voted to kill the tobacco bill, the major tobacco manufacturers were promising to mount a television ad campaign to support those who voted against the bill." [citation omitted] I was present at the meeting and this is an accurate report of what Senator

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The examples from both parties are abundant. Current Senator John McCain recounts how, while a bill was pending to get generic drugs to market faster, the Republican senatorial and congressional campaign committees held a gala dinner that raised nearly $30 million in mostly soft money, a substantial portion of which came from pharmaceutical companies. McCain Decl. ¶ 11. He also witnessed the "hijack[ing]" of telecommunications deregulation legislation that ended up "filled with internal inconsistencies designed to appease . . . competing donors rather than to serve the public interest," and he saw the demise of an important amendment to the Sarbanes-Oxley corporate governance bill based on the opposition of large donors to the parties. McCain Decl. ¶¶ 9-10.

Warren Rudman describes how "[s]ome large donors will ask for help with personal causes, such as immigration matters, tax reform, or political appointments. Others attend meetings with elected officials in order to voice their company or industry's concerns with particular legislation and to affect the outcome of the legislation." Rudman Decl. ¶ 8. He concludes that "[e]lected officials may not intend to be affected by such access, but the fact is that they receive a disproportionate amount of input and advice from larger, more wealthy contributors. This can skew their judgment." *Id.*

The Former Members can recount witnessing instances when favors for soft money donors were dispensed in a number of ways, including tactical parliamentary

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McConnell said. This episode graphically indicates that corporate soft money is widely used to influence legislative votes.

Declaration of Senator John McCain ("McCain Decl.") ¶ 8.



maneuvers such as the offering of amendments, mobilization of support or opposition, and speeding or delaying action. The Former Members join with Senator David Boren when he says "I know from my first-hand experience and from my interactions with other Senators that they did feel beholden to large donors." Boren Decl. ¶ 8. Such feelings are openly acknowledged in moments of candor:

> I remember specific instances when Senators' votes were affected by the fear of losing future donations. One time, Senator Bob Dole and I were seeking votes on an important national issue. More than once, we heard a Senator tell us, 'I realize it's an issue of great importance, but if I vote for that I won't get any more money. I want to be here for another term. You do want me back here next year, don't you?' These senators know that it's a bad idea to poison the well that nourishes the system.

Simpson Decl. ¶ 11.

Of course, special interests are not limited to making soft money donations, and critics of reform might protest that soft money is no more corrupting than hard money. The Former Members simply state to the contrary that soft money carries more risk for the simple reason that the donations are so much larger. Hard money donations are limited in size. Soft money donations are in effect unlimited. These large, soft money donations, both past and anticipated, are more prominent in the minds of the Members. The Members know, in deciding on a vote or parliamentary tactic, that a lot of money can ride on what they are about to do. They do not necessarily change their minds for that reason, but there is an insidious effect on the psychology of the institution. Quite humanly, Members may hope for an easier time fund-raising in the next

election cycle, or they may fear a more difficult effort. They know that "[w]hen people have donated $50,000 or $100,000, they are going to want their pound of flesh after the election." Simon Decl. ¶ 15. The recipients of such donations know that the piper must be paid, or at least respected: " . . . many Members of this body pause at least once to ask themselves how a vote will affect their contributions when they should be asking solely how it will affect this great Nation." 148 Cong. Rec. H373 (2002) (Statement of Rep. Baird). Again, these effects are magnified in the case of critical decisions by leadership.

Members often seek out positions on powerful committees, such as the Senate's Finance Committee or the House's Ways and Means, in part because it is easier to raise money from those positions. Most of this money is raised from donors who have matters of interest pending before these committees. The party committees and leaders in turn expect the Members on these powerful legislative committees to raise more soft money for the party committees.

The overwhelming principle motivating donors is the need to obtain access and influence. This is particularly clear in light of the frequent practice of making large donations to both parties. Forty of the 50 top soft money donors in 1996 donated to both parties, as did 35 of the top donors in 2000. Kollar-Kotelly Op. at 619sa-620sa *citing* Expert Report of Thomas Mann tbls. 5-6). This seemingly contradictory behavior is in fact easily explained by the need donors feel for access on both sides of the aisle and by a fear, based on experience, that they will be ignored or even punished by one party if they give only to the other. Many donors are left feeling "shaken down" for their money.



Remaining in office is a form of personal benefit to a Member of Congress. Members enjoy financial and other emoluments and privileges and a status not available to most citizens. These benefits are hard earned and deserved. Indeed, many Members make tremendous personal financial and other sacrifices in order to serve the public. Nonetheless, most Members desire to continue in elected office. Their desire requires reelection, and their reelection campaigns depend on raising huge sums of money. The money necessary to deter or defeat opponents and win reelection increasingly comes from large donors and political parties, often in the form of soft money.

Pre-BCRA practices involving soft money exploited loopholes in the previous election law, and turned that law on its head. Indeed, BCRA's sponsor said that BCRA's purpose is "to enforce the 1907 law banning corporate treasury money, the 1947 [law] banning union dues money, and enforce the 1974 law banning unlimited sums of money." 148 Cong. Rec. H346 (2002) (Statement of Rep. Shays). BCRA is designed to restore force and effect to these earlier statutes, which have already been upheld by this Court.

The Former Members urge the Court to consider their experience. The current system of political fund-raising is badly in need of repair. The process of donation to Members, followed by access and favor granted by Members, followed by further donation to Members, is inherently corrupting at the institutional level even though the participants are well intentioned and do nothing legally wrong. This cycle reinforces itself when donors tend to ignore Members who do not provide access and favors, and Members tend not to provide access and favors to those who do not donate. The circle is complete without the necessity of a *quid pro quo*. *Quid* regularly followed by *quo*

is amply sufficient. BCRA removes the most powerful force in this cycle – soft money.

### C. Soft Money Donations Unavoidably Corrupt the Electoral Process.

Beyond the distortions to the legislative process, soft money is also deleterious to the electoral process under the pre-BCRA system. It is soft money that fuels the abuses associated with "issue advertisements" and "coordinated expenditures." An issue advertisement simply masks the otherwise illicit infusion of soft money into congressional elections through a charade-like and formalistic compliance with the law. Issue advertisements studiously avoid a "direct" pitch to the public to vote one way or another, instead making that pitch indirectly (but still effectively) by urging support or opposition to a particular issue and then tying that support or opposition to a particular candidate with statements such as "tell him [the opponent] to quit doing that." Most issue advertisements run in the periods immediately prior to elections, so it is apparent they are not intended to provoke debate on the issues of the day, as their name might suggest. Voters get the very obvious message that they should vote for or against Congressman X. It is the Former Members' experience and belief that the so-called "express advocacy" test to determine whether a campaign advertisement comes within the scope of FECA is so easily avoided as to render meaningless the ban on companies and unions using treasury funds to pay for advertisements designed to influence federal elections.

By law, advertisements paid for with soft money must be sponsored and funded by outside organizations or the parties themselves. Additionally, the sponsors of the advertisements must avoid explicit coordination of their



advertisements with the campaign in question. Otherwise, the cost of the advertisements is considered to be an in-kind contribution to the campaign, which may be illegal if funded by soft money. Explicit coordination with the campaign is unnecessary because election consultants who have no formal ties to campaigns are perfectly capable of analyzing what message will be useful to elect or defeat a particular candidate. Candidates rarely take action to stop issue advertisements they perceive as helpful.

The coordination between the candidate and the sponsor can take other indirect forms, such as when the consultants producing the advertisements work for other candidates for federal office in the same areas where the advertisements run. Consultants or staffers sometimes move freely from a job working for a candidate to one working for the sponsoring advocacy group and vice versa. Political parties can also be the conduit for information between campaigns and advocacy groups. Sometimes political parties loan persons to assist campaigns with their media. These persons may also serve unwittingly as a conduit between a political party and the campaign. With such overlaps, polling data and other research and advice often are shared. While these relationships and behaviors effectively coordinate soft money expenditures with the campaign, the "independent" expenditures are not counted as campaign contributions under FEC decisions that narrowly and unrealistically define coordination as "substantial discussion" about the coordinated communication. *See, e.g., FEC v. The Christian Coalition*, 52 F. Supp. 2d 45, 91-92 (D.D.C. 1999).

There is ample evidence that political parties, party committees and candidates for office manipulate this soft money loophole to their advantage. Candidates or others associated with them sometimes circumvent limits applicable to donations to campaigns by suggesting that donors

contribute to the interest groups that run the issue advertisements. Members are frequently favorably disposed towards such donors just as they would be to other soft money donors.

Specific examples of the circumvention of pre-BCRA election law abound. "The national Democratic party managed to finance two-thirds of its pro-Clinton 'issue ad' television blitz by taking advantage of the more favorable allocation methods available to state parties. They simply transferred the requisite mix of hard and soft dollars to party committees in the states they targeted and had the state committees place the ads." Mann Expert Report at 22, *quoted in* Kollar-Kotelly Op. at 494sa. Republicans engage in the same types of conduct:

> [The group "Republicans for Clean Air"] sponsored ads praising then-Governor George W. Bush and criticizing Senator John McCain before the 2000 Republican presidential primaries in three states. Eventually, after the first of these primaries (South Carolina's) reporters uncovered that Republicans for Clean Air consisted of two brothers, Charles and Sam Wyly, long-time friends and supporters of Governor Bush. Charles Wyly, in fact, was an authorized fundraiser for the Bush campaign. . . . [I]t is impossible to imagine officials of the Bush campaign were in the dark about Republicans for Clean Air. According to press estimates, the Wylys spent $25 million on their ads for Governor Bush. [internal footnote omitted] We find it inconceivable that an expenditure of that magnitude could remain unknown to the small circle of financial leaders close to both the Bush campaign and the Wylys (including Charles Wyly himself) or the even smaller circle of Republican media consultants.



Jonathan S. Krasno & Frank Sorauf, *Issue Advocacy and the Integrity of the Political Process, in* INSIDE THE CAMPAIGN FINANCE BATTLE: COURT TESTIMONY ON THE NEW REFORMS 189, 194-95 (Anthony Corrado et al. eds., 2003).[6]

It is apparent to the Former Members that soft money is not being used by the parties for state and local elections or for other party-building activities, as FECA contemplates. The national parties raise soft money and work through state parties to influence federal elections. Party-sponsored soft money advertisements increasingly have become explicit electioneering. Parties and their committees are almost never mentioned in the advertisements for which they pay. In 2000, for example, 92% of the advertisements paid for by the parties did not even identify the name of the party. None encouraged voters to register with the party or to volunteer in support of the party. Craig B. Holman & Luke P. McLoughlin, *Buying Time 2000* at 64 (2001), *quoted in* Kollar-Kotelly Op. at 507sa. But 99 percent of such ads in 2000 mention candidates, 51 percent name the opposing candidate, 17 percent name the party's candidate, and 32 percent name both candidates. Jonathan S. Krasno & Frank Sorauf, *Why Soft Money Has Not Strengthened Parties, in* INSIDE THE CAMPAIGN FINANCE BATTLE: COURT TESTIMONY ON THE NEW REFORMS 49, 51 (Anthony Corrado et al. eds., 2003).

The soft money exception has swallowed the rule. Such blatant disregard of campaign contribution limits by the combination of soft money and issue advertisements

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[6] Jonathan Krasno is a Visiting Fellow at Yale University's Institute for Social and Policy Studies. Frank Sorauf is a Regents' Emeritus Professor of Political Science at the University of Minnesota. Both filed expert testimony for the Appellees in the Court proceedings below.

should not be permitted. It can best be corrected by upholding BCRA.

Generally, the public needs to know the true source of an advertisement in order to fairly assess it and assign a degree of credibility. Another problem with issue advertisements not paid for by party committees is that they frequently are paid for with money filtered through nominal "committees" that do not disclose in any meaningful way how or by whom they are funded. While pre-BCRA law requires the sponsor to identify itself at the end of the advertisement, such identification can be the name of an entity created to conceal the identity of the true sponsor. The lack of full disclosure of receipts and expenditures for issue advertisements undermines the candor and financial transparency that should be present in elections. The secrecy creates opportunity for corruption, since the public does not know who is paying for advertisements that benefit a candidate.

Disclosure was one of the primary objectives of FECA, and was seen by this Court as a substantial guard against corruption. As this Court has held, "[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return." *Buckley*, 424 U.S. at 67. Without BCRA, the disclosure requirements of FECA can be evaded. BCRA will restore it to efficacy.



## II. BCRA WILL HELP RESTORE OUR CITIZENS' FAITH IN DEMOCRACY.

### A. BCRA Mitigates the Appearance of Corruption.

This Court has repeatedly held that the public perception of the probity of elected representatives is an important and sufficient governmental interest.[7] BCRA was passed, in part, not only to address actual corruption, but to address the appearance of corruption, an issue this Court has previously noted as being of grave concern to our democracy. In *Nixon v. Shrink Mo. Gov't Political Action Comm.*, 528 U.S. 377, 390 (2000), the Court warned that the " . . . cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." BCRA was Congress's response both to the wholesale evasion over time of the principles underlying the FECA and to the growing appearance of corruption and its corrosive effect.

As the district court noted, in the 2000 election cycle almost a half billion dollars in soft money was contributed to the national parties by corporations, unions and wealthy individuals. Memorandum Opinion of Judge

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[7] This Court has stated that legislation may be justified by a government's interest in preventing the appearance of corruption in addition to actual corruption. *FEÇ v. National Right to Work Comm.*, 459 U.S. 197, 208 (1982) (affirming the "importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption"); *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) ("Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.").

Richard J. Leon (D.D.C. May 1, 2003), *reprinted in* Appellants' June 2003 Supplemental Appendix to Jurisdictional Statements Vol. IV at 1189sa; Kollar-Kotelly Op. at 491sa. Although these funds were ostensibly not made for the purpose of influencing the outcome of federal elections, the Former Members' experience demonstrates that the public believes the opposite – and for good reason. The Federal campaign law prior to the enactment of BCRA had become so riddled with loopholes, and large contributors had become so adept at exploiting these loopholes, that the safeguards against corruption and the appearance of corruption were rendered meaningless.

The pervasive public cynicism about the electoral process is directly linked to the perception that a citizen without great wealth cannot effectively participate in government. Too many citizens believe that "money talks" and that only "big money" talks with any effectiveness. This belief leaves non-wealthy citizens with a sense that their participation does not matter and so corrodes the foundation of participatory democracy. The health of republican government will be strengthened when a major corrupting influence, one that is obvious to the average voter, is curtailed. Nearly three-quarters of voters believe that their congressional representatives sometimes decide how to vote on an issue based on what their party's big donors want. Mark Mellman & Richard Wirthlin, *Public Views on Party Soft Money, in* INSIDE THE CAMPAIGN FINANCE BATTLE: COURT TESTIMONY ON THE NEW REFORMS 267 (Corrado, Mann & Potter eds., 2003). Campaign laws and practices which, without BCRA, seem to the public to be designed to discourage voter participation and diminish public confidence in government and in the electoral process are a shame. BCRA will help end that shame. The Former Members believe that this Court's affirmation of BCRA and BCRA's underlying principles will do much to



restore the faith of the citizenry in our democratic processes by mitigating the appearance of corruption.

### B. BCRA Enhances Political Participation and Discourse.

BCRA will strengthen the electoral process by fostering a greater role in that process for the individual voter and small contributor, a role that prior legislation sought to protect, but which soft money practices have trampled. BCRA's opponents assert that it will impinge free speech. To the contrary, the Act will expand the speech opportunities for the vast majority of "ordinary" citizens in the electoral process.

The Constitution establishes a system where the Members of Congress represent the people of a particular state or district. Soft money practices effectively undermine and distort that system, affording soft money donors influence that eclipses that of the average voter and average donor. Their voices are lost when Members grant disproportionate access and other attention to soft money donors. Senator Simon has expressed the Former Members' views in this regard:

> In a very real sense, we are going through the old fight between Thomas Jefferson and Alexander Hamilton: should propertied interests have preference in what goes on in government? And our answer, with our present system of financing campaigns, is yes, people with money are going to be given greater influence, because their names are going to be recognized. They are going to have greater access than those who did not contribute. The soft money system is the most egregious part of the abuse of political contributions resulting in preferred access.

Simon Decl. ¶ 17.

The voices of the average voter and the average small donor are drowned out when a flood of soft money, from undisclosed sources, pours into a race. Those citizens see and understand what is going on, and they are discouraged from participating and even from voting. As money tends to compromise the elected, it also serves to disenfranchise the electors. Any true competition of ideas has little chance when faced with the financial conglomerate of special interests. Such distortions have been curbed in the past with this Court's approval, and the Former Members respectfully urge the Court to uphold BCRA, which was Congress' long-fought effort to eliminate the worst abuses in the campaign finance system.

BCRA will go far to counter the dismay with which people react to the big money politics of the recent past. The Former Members have remained active in public affairs in many different ways and continue to have extensive opportunity to listen to the public on matters of concern. They continue to encounter the palpable cynicism about government in general and soft money politics in particular they experienced while in office. One of the issues most frequently mentioned is campaign finance and soft money. The public is angry and frustrated with government officials who often appear to be for rent. The public is convinced that Members and other federal officials are beholden to special interests who bankroll campaigns through unlimited soft money donations. They believe that these interests have far too much sway over their representatives, and they believe their own votes, their own participation in grassroots activities, and their own small donations do not count for much. These beliefs generate the apathy, indifference and low voter turnout that cut at the very root of American democracy. Representative democracy is seriously damaged when so many citizens believe they have no meaningful opportunity to



participate in government because they lack the financial resources to compete with rich and powerful donors.

BCRA stands for the proposition that the national government is not for sale to the highest bidder, and it welcomes and encourages the participation of the average citizen. Without that participation, the American political system is in peril. Senator John Glenn, once a candidate for this country's highest office, framed the issue clearly:

> I hope that when the courts review this law, they consider what the future of this country is going to be. In this case, the courts will be dealing with an issue that is going to be a key part of whether this country continues to look at itself as a country that represents every citizen's interests equally, or whether we go back toward that oligarchy from which we escaped in 1776. Yet the great thing about this country is that there is no such thing as an average citizen. Under the Constitution, every citizen should be considered equal and supreme. If we get away from that, we get away from what makes this country great.

Declaration of Senator John Glenn ¶ 7.

## CONCLUSION

BCRA's reforms were designed principally to restore the integrity of the Federal Election Campaign Act, to address the fundamental concerns expressed in *Buckley v. Valeo* regarding corruption and the appearance of corruption, and to stop the massive use of soft money to circumvent the constitutionally approved limitations on campaign contributions. This Court should give effect to

BCRA's objectives and affirm and reverse the decision of the Court below accordingly.

Respectfully submitted,

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August 5, 2003



## APPENDIX

The Former Members who have joined in this brief are an impressive and diverse bipartisan group whose service in Congress and experience in federal elections spans the modern campaign era. Collectively, they represent more than 500 years of elected public service at the federal level. They come from both sides of the political aisle with constituencies from all walks of life: young and old, poor and wealthy, urban and rural, educated and uneducated. They are listed below:

Representative John B. Anderson served as a Republican U.S. Representative from Illinois from 1961 to 1981. He was a candidate for President of the United States in 1980.

Representative Michael D. Barnes served as a Democratic U.S. Representative from Maryland from 1979 to 1987.

Representative Thomas M. Barrett served as a Democratic U.S. Representative from Wisconsin from 1993 to 2003.

Representative Anthony Beilenson served as a Democratic U.S. Representative from California from 1977 to 1997.

Representative James H. Bilbry served as a Democratic U.S. Representative from Nevada from 1987 to 1995.

Representative Robert A. Borski served as a Democratic U.S. Representative from Pennsylvania from 1983 to 2003.

Senator Leslie L. Byrne is currently a Virginia State Senator. She served as a Democratic U.S. Representative from Virginia from 1993 to 1995.

Representative Bob Carr served as a Democratic U.S. Representative from Michigan from 1975 to 1981 and 1983 to 1995.

Representative William F. Clinger served as a Republican U.S. Representative from Pennsylvania from 1979 to 1997.

Representative Barber B. Conable, Jr. served as a Republican U.S. Representative from New York from 1965 to 1985.

Representative Sam Coppersmith served as a Democratic U.S. Representative from Arizona from 1993 to 1995.

Representative William J. Coyne served as a Democratic U.S. Representative from Pennsylvania from 1981 to 2003.

Representative Thomas J. Downey served as a Democratic U.S. Representative from New York from 1975 to 1993.

Senator Thomas F. Eagleton served as a Democratic U.S. Senator from Missouri from 1968 to 1987.

Representative Don Edwards served as a Democratic U.S. Representative from California from 1963 to 1995.

Representative Ben Erdreich served as a Democratic U.S. Representative from Alabama from 1983 to 1993.

Representative Peter Hoagland served as a Democratic U.S. Representative from Nebraska from 1989 to 1995.

Representative Elizabeth Holtzman served as a Democratic U.S. Representative from New York from 1973 to 1981.

Representative James P. Johnson served as a Republican U.S. Representative from Colorado from 1973 to 1981.

Representative Robert Kastenmeier served as a Democratic U.S. Representative from Wisconsin from 1959 to 1991.

Representative John J. LaFalce served as a Democratic U.S. Representative from New York from 1975 to 2003.



Representative Elliott H. Levitas served as a Democratic U.S. Representative from Georgia from 1975 to 1985.

Representative Bill Luther served as a Democratic U.S. Representative from Minnesota from 1995 to 2003.

Representative James Maloney served as a Democratic U.S. Representative from Connecticut from 1997 to 2003.

Representative Marc Lincoln. Marks served as a Republican U.S. Representative from Pennsylvania from 1977 to 1983.

Representative Abner J. Mikva served as a Democratic U.S. Representative from Illinois from 1969 to 1973, September 1975 to 1979.

Vice President Walter F. Mondale served as Vice President of the United States from 1977 to 1981. He served as a Democratic U.S. Senator from Minnesota from 1964 to 1976. He was a candidate for President of the United States in 1984.

Representative Jim Moody served as a Democratic U.S. Representative from Wisconsin from 1983 to 1993.

Representative Constance A. Morella served as a Republican U.S. Representative from Maryland from 1987 to 2003.

Senator Charles H. Percy served as a Republican U.S. Senator from Illinois from 1967 to 1985.

Representative John Edward Porter served as a Republican U.S. Representative from Illinois from 1980 to 2001.

Representative Glenn Poshard served as a Democratic U.S. Representative from Illinois from 1989 to 1999.

Senator David Pryor served as a Democratic U.S. Senator from Arkansas from 1979 to 1997. He served as a Democratic U.S. Representative from Arkansas from 1966 to 1973.

Representative Patricia Schroeder served as a Democratic U.S. Representative from Colorado from 1973 to 1997.

Representative Karen Shepherd served as a Democratic U.S. Representative from Utah from 1993 to 1995.

Representative David E. Skaggs served as a Democratic U.S. Representative from Colorado from 1987 to 1999.

Representative Peter Smith served as a Republican U.S. Representative from Vermont from 1989 to 1991.

Senator Adlai E. Stevenson, III served as a Democratic U.S. Senator from Illinois from 1970 to 1981.

Representative Richard Swett served as a Democratic U.S. Representative from New Hampshire from 1991 to 1995.

Representative Jill Long Thompson served as a Democratic U.S. Representative from Indiana from 1989 to 1995.

Governor Lowell Weicker served as an Independent Governor for the State of Connecticut from 1991 to 1995. He served as a Republican U.S. Senator from Connecticut from 1971 to 1989. He served as a Republican U.S. Representative from Connecticut from 1969 to 1971.

Representative Howard E. Wolpe served as a Democratic U.S. Representative from Michigan from 1979 to 1993.